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In The
Supreme Court of the United States

OCTOBER TERM, 1941

NO. 28

CLOVERLEAF BUTTER COMPANY,
A CORPORATION,
Petitioner,

vs.

HAYGOOD PATERSON as Commissioner of Agriculture & Industries of the State of Alabama, et. al.,
Respondents.

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

I.

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which petitioner is asking this Court to review, is reported in 116 F. (2d) 227.

II.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this court to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered on the fourteenth day of January, 1941. Petitioner relies upon Section 240 of the Judicial Code as amended by Acts of February 13, 1925, Subsections (a) and (b), separately and severally (U.S.C.A., Title 28, Sec. 347), and also Rule 38 of the Revised Rules of the Supreme Court of the United States, adopted February 13, 1939.

III.

STATEMENT OF CASE.

The Department of Agriculture and Industries of the State of Alabama acting through its Division of Agricultural Chemistry during the period from April, 1939 to June, 1940, seized certain country or packing stock butter belonging to petitioner, which butter allegedly was to be used in processing or renovating butter in Alabama for sale there and in other states. Some of the butter seized was bought in Alabama, while some of it was brought to petitioner's plant from other states. The seizures were made in every instance under authority of, in conformity to and completely within Section 217, Agricultural Code of Alabama of 1927 as amended by General Acts, 1935, Section 3, pp. 1103 and 1104,

and Section 218 of said Agricultural Code of 1927 (Appendix pp. 54, 56). See Affidavit for Writ of Attachment for Condemnation, copy of which appears in Appendix, p. 60.) The seizures were made in each instance on the theory that such country or packing stock butter was an adulterated food within the meaning of Sections 37, 38, and 39 of the Agricultural Code of Alabama of 1927 (Appendix pages 52, 53) in that it consisted "in whole or in part of a filthy, decomposed or putrid vegetable or animal substance or any portion of an animal unfit for food, whether manufactured or not * * * ."

On June 28, 1940, there was filed in the United States District Court, Southern Division of the Middle District of Alabama, a complaint seeking a temporary and permanent injunction against the Commissioner of Agriculture and Industries of the State of Alabama and the Director of the Division of Agricultural Chemistry in the Department of Agriculture and Industries of the State of Alabama, to restrain them from inspecting petitioner's plant, or inspecting or seizing packing stock butter at such plant. (R. 1). On the same day, June 28, 1940, the Honorable C. B. Kennamer, Judge of said District Court, entered an order setting the application for preliminary injunction for hearing on the twelfth day of July, 1940, (R. 20).

On July 12, 1940, respondents filed a motion to dismiss the complaint, (R. 34). This motion to dismiss was first overruled by the District Court, (R.

35). Thereupon the respondents filed an answer and the petitioner moved to strike from the answer filed certain language set out in the said motion. The Court overruled the motion to strike (See reference in third paragraph of the decree, R. 35), and set Thursday, July 25, 1940 as the time and place for further hearing.

Prior to the date fixed for the further hearing, counsel for the parties agreed to limit the issues to be submitted to the Court by stipulation, in lieu of taking testimony, and to resubmit the cause to the Court on the complaint and the stipulation limiting the issues and the motion to dismiss. Pursuant thereto, the parties entered into such stipulation (R. 36, 37) and, on the same date, (July 23, 1940) resubmitted the cause to the Court on the complaint and stipulation and the motion to dismiss. On this submission, the Court entered the decree dismissing the bill, (R. 37). Petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit was duly filed (R. 39) and allowed on July 23, 1940, (R. 37).

Upon consideration of the matters and things presented on the appeal, the United States Circuit Court of Appeals for the Fifth District affirmed the judgment of the District Court of the United States for the Middle District of Alabama (R. 52), Circuit Judge Hutcheson issuing the opinion (R. 42) with Foster, J. dissenting.

Petitioner's application for rehearing, filed on January 4, 1941, was duly denied by the Circuit Court of Appeals on January 14, 1941 (R. 53), whereupon petitioner applied to this Honorable Court for writ of certiorari, which was granted by order filed April 7, 1941 (R. 55).

IV.

QUESTIONS FOR DECISION.

The questions of law at issue were stipulated below to be the following:

1. Has Congress, by the enactments relating to renovated or process butter, pre-empted the field of inspection and regulation of the raw material, in interstate commerce, out of which such renovated or process butter is manufactured by the plaintiff as alleged in the bill, to the exclusion of the power of the State, its officers or agents to inspect and regulate the quality of such raw material?

2. Does the inspection of packing stock butter, in interstate commerce, used by the plaintiff in the manufacture of process or renovated butter as alleged in the bill of complaint, made or directed to be made by the Secretary of Agriculture of the United States, pursuant to the Federal laws and regulations relating to renovated or process butter, have the effect in connection with said Federal laws of excluding the State of Alabama, its officers and

agents, from inspecting or seizing or suspending the packing stock butter, in interstate commerce out of which renovated butter to be sold in interstate commerce as alleged in the complaint is manufactured by the plaintiff as alleged in the complaint?

3. Under the Federal statutes, is the Secretary of Agriculture of the United States the sole judge, to the exclusion of State officers and agents, of the fitness and suitability of packing stock butter, in interstate commerce as alleged in the bill, for use by the plaintiff as raw material in the manufacture of renovated or process butter for sale in interstate commerce as alleged in the bill?

4. It is further stipulated and agreed that there is no conflict in the standards of the State of Alabama and the Federal Government, relating to the fitness or suitability of packing stock butter in interstate commerce to be used as raw material in the manufacture of renovated or process butter, and that this case be confined to the legal questions set out in paragraphs 1, 2, and 3, above.

5. It is agreed that the phrase "in interstate commerce" as used in this stipulation, shall be construed to mean "procured, transported, handled, or sold as alleged in the complaint", as the context may indicate. (R. 36).

ARGUMENT.

I

THE DECISION OF THE COURT OF APPEALS IN THIS CAUSE IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT.

A.

The Protection and Promotion of the Health of its Citizens is an inherent Power of the State of Alabama, and so long as the exercise of this power does not conflict with the Constitution or Statutes of the Central Government, the State of Alabama may act without limitation, even though its action may directly affect Interstate Commerce.

The general principles covering the exercise of State authority when interstate commerce is affected, have been repeatedly stated by this Court. Many cases are collected in the opinions in the *Minnesota Rate Cases*, 230 U. S. 352, 398-412, and *South Carolina Highway Department vs. Barnwell Bros.*, 303 U. S. 177, 184, 188-191.[1]

From the authorities collated in these decisions, it is apparent that State statutes designed to safeguard the health of the inhabitants of the State, and to protect those inhabitants from fraud and imposi-

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[1]While other cases might be cited, we deem it inadvisable to unnecessarily burden this brief with them, since these two cases deal at length with most of the pertinent ones.

tion, and proceedings by state officials under such statutes and directed to the same end, are valid when reasonable in their requirements and not in conflict with Federal laws, although they may affect interstate commerce in their relation to articles prepared for export or by including, incidentally, those brought into the State. In *Eichholz v. Public Service Commission of Missouri*, 306 U. S. 268 at page 274, Mr. Chief Justice Hughes observed:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests *even though interstate commerce is directly affected.*" (Emphasis supplied)

Here it appears from the complaint that at least ten per cent of the butter produced from this packing stock butter is sold to citizens of the State of Alabama.

It will not be disputed, we think, that it is within the power of the State to make regulations in the exercise of the police power prohibiting within its borders the manufacture and sale of adulterated food, where part of that food will be sold to its citizens, and that such action does not violate the commerce clause of the Federal Constitution even though

its effect is to impose a burden on interstate commerce.[2]

The pertinent provisions of the Agricultural Code of Alabama of 1927 are obviously directed to the end of protecting the health of the inhabitants of the State of Alabama, and apparently the provisions seek to safeguard against the consequence of ignorance and incapacity, as well as fraud.[3] The pertinent sections of the Agricultural Code of Alabama, 1927, are set out in the Appendix at pp. 52-59.

Reference to Section 36 of Article 7 reveals that the purpose of the article is,

> "to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes".

In line with this purpose, it is provided by Section 218 that,

> "*** any article of food or drug which is adulterated *** and which is *** delivered within this state *** shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation".

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[2] *Clason v. Indiana*, 306 U. S. 439; *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 505; *Carey v. South Dakota*, 250 U. S. 118; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427; *Weigle v. Curtice Bros. Co.*, 238 U. S. 285; *Sligh v. Kirkwood*, 237 U. S. 52; *Savage v. Jones*, 225 U. S. 501; *Crossman v. Lurman*, 192 U. S. 189; *Plumley v. Massachusetts*, 155 U S. 461; *Powell v. Pennsylvania*, 127 U. S. 678. See also: *Skiriotes v. Fla.*, No. 658, decided April 28, 1941, 85 L. ed. 825, 829; *California v. Thompson*, No. 687, decided April 28, 1941, 85 L. ed. 793, 796.

[3] Cf. *Plumley vs. Massachusetts*, supra p. 472, citing *Dent vs. West Virginia*, 129 U. S. 114, 122.

The term "food" is defined by Section 38 as including

> "all articles of food, drink, confectionery, or condiment, whether simple, mixed, or compound, used or intended for use by man or domestic animals."

In Section 39 it is stated that an article shall be deemed adulterated in the case of food,

> "if it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of an animal unfit for food, whether manufactured or not *** ".

These regulations, it is submitted, were imposed by the Legislature of Alabama in accordance with its constitutional right to determine the policy which it believed would protect the health of the people of the State of Alabama and safeguard them from fraud and imposition.[6]

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[5]NOTE that in *U. S. vs. Nine Barrels of Butter*, 241 Fed. 499, 500, District Judge Learned Hand writing to the question of whether packing stock butter should be considered as "food" stated:

> "Doubts may arise, where goods are shipped in interstate commerce, which may or may not be articles of food, as their ultimate destination may determine; but this case does not raise them. By no chance can this butter be called anything but an article of food; by no chance can I avoid the conclusion that it was filthy and decomposed in part. As such it came within the terms of the statute, even though it might be saved and reclaimed by being made clean and palatable."

In *Union Dairy Co. v. U. S.*, 250 Fed. 231, and in *U. S. v. 52 Drums of Maple Syrup*, 110 Fed. (2d) 914, 915, it is held that the fact that the foods therein considered (milk and maple syrup respectively) were to be further processed before sale, made them none the less "foods" and constituted no defense to seizure and confiscation if they were adulterated.

[6]Cf. *Pacific States Co. vs. White*, 296 U. S. 176, 181, 182. Also, compare logic of Mr. Justice Black in the dissent in *Polk Co. vs. Glover*, 305 U. S. 5, 11, 15.

It can be concluded, therefore, that these provisions being enacted under the police power of the State, may be effective to authorize the inspection and regulation of petitioner's packing stock butter delivered in the State of Alabama, even though they may incidentally affect interstate commerce.*

This conclusion is based, of course, upon the assumption of an absence of Federal legislation precluding such regulation by the State. Whether the act which petitioner styles the Renovated Butter Act of 1902 preempts state action as is contended for by petitioner is therefore to be considered.

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*Petitioner's argument that the State officials in inspecting petitioner's plant and seizing the packing stock butter are exceeding the State standard is palpably specious and obviously untenable. It is not shown or contended that the State has adopted standards particularly applicable to packing stock butter. Indeed, no other standards need be adopted than those provided by the statute for all foods, for as already shown, packing stock butter most certainly is a "food". Since the State has adopted no particular standards for packing stock butter, it cannot be argued that the State officials "have gone and will continue to go beyond any State standard for packing stock butter". (See Argument, petitioner's brief, pp. 22, 43, 49 and 70.)

The State officials have treated the packing stock butter as a food and have proceeded against it as such only as authorized by the statute. So actually petitioner's argument can only come to this: That the State officials, in inspecting and seizing the packing stock butter, acted pursuant to and within the State statute, but that their action in so doing was unauthorized for the reason that the Federal government has entered the field to their exclusion. Thus was the question presented to and considered by the District Court and the Circuit Court of Appeals (R. p. 46) and thus shall we consider it here.

* * * *

Apposite to the implication from the facts which astute counsel for petitioner detail on page 5 of Brief for Petitioner, and in refutation of it, is the following from this Court's opinion in *Kelly vs. Washington*, 302 U. S. 1, at p. 14:

> "Much is made of the fact that the state law remained unenforced for a long period. But it did not become inoperative for that reason. Where the state police power exists, it is not lost by non-exercise but remains to be exerted as local exigencies may demand."

B.

Congress has not exclusively occupied the field by the Renovated Butter Act, nor has it, by such Act, regulated Interstate Commerce so completely as to prohibit State action.

"The nature of the power exerted by Congress, the object sought to be obtained, and the character of the obligations imposed by the law, are all important in considering the question of whether supreme Federal requirements preclude enforcement of State laws on the same subject." *Hines v. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed. 366, 374.

1.

The Renovated Butter Act is not intended as a regulation of commerce. It is a revenue measure. Its object and scope has long since been delineated by this Court.

It is earnestly contended by petitioner that Congress, by the enactment of the so-called Renovated Butter Act of 1902, has preempted the field of inspection and regulation of country or packing stock butter going into the manufacture of process or renovated butter, which will in turn be sold partially within the State and partially in interstate commerce. Counsel for petitioner, on p. 27 of their brief, state:

"All the sections and all the regulations promulgated under the statute look to complete control of raw material in interstate commerce by the Secretary of Agriculture of the United States."

We earnestly submit, however, that the conclusion of counsel is specious, in that it erroneously assumes that the basic purpose of the Renovated Butter Act and the regulations promulgated pursuant thereto is to regulate commerce.*

We take it to be well established that the power exerted by Congress in the enactment of this statute is the power to raise revenue. The primary object sought to be obtained is to secure revenue.

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*Note that in *Plumley v. Massachusetts*, 155 U. S. 461, 466, it is stated

"Nor was the Act of Congress (the Oleomargarine Act of 1886 in 24 Stat., 209, the parent of the act here considered) relating to oleomargarine intended as a regulation of commerce among the States. Its provisions do not have special application to the transfer of oleomargerine from one State of the Union to another. They relieve the manufacturer or seller, if he conforms to the regulations prescribed by Congress or by the Commissioner of Internal Revenue under the authority conferred upon him in that regard, from penalty or punishment so far as the general government is concerned, but they do not interfer with the exercise by the States of any authority they possess of preventing deception or fraud in the sales of property within their respective limits."

*Counsel rely heavily on the dictum from the opinion of District Judge Platt in the case of *U. S. v. Bohl* to the effect that "section 5 (of the Renovated Butter Act of 1902) goes to the commerce clause as the fountain whence its vigor springs," to support their contention that the Renovated Butter Act is bottomed upon the commerce power and that its true purpose is the regulation of commerce. Both counsel, and the District Judge in stating his dictum, seem to have overlooked the fundamental principle which this Court has formulated as a guide to be used in determining the nature of the power exerted by Congress and the object sought to be obtained in the enactment of such provisions. This principle is that the expositor must look to the face of the act as a whole—not to a single isolated section—in order to determine its true character. *Sonzinsky v. U. S.*, 300 U. S. 506, 513; *McCray v. U. S.*, 195 U. S. 27; *Nigro v. U. S.*, 276 U. S. 332, 353, 354. This Court, in considering the act in its entirety, has held in effect that the regulatory provisions were in execution of or supplementary to those portions of the statute imposing taxes. *In re Kollock*, 165 U. S. 526, 533; *Plumley v. Mass.*, 155 U. S. 461.

It is to be remembered that the Renovated Butter Act of 1902, 32 Stat. 193, was but an amendment and an extension of the Oleomargarine Act of 1886, 24 Stat. 209. This Court, in considering the Act of 1886 in *In Re Kollock*, 165 U. S. 526, 537 observed:

> "The oleomargarine legislation does not differ in character from this, and the object is the same in both, namely, to secure revenue by internal taxation and to prevent fraud in the collection of such revenue. *Protection to purchasers in respect of getting the real and not a spurious article cannot be held to be the primary object in either instance*, and the identification of dealer, substance, quantity, etc., by marking and branding *must be regarded as means to effectuate the objects of the act in respect of revenue.*" (Emphasis supplied)

At the October Term, 1903, there was presented to this Court, in *McCray vs. United States*, 195 U. S. 27, the validity of the 1902 Act. Mr. Justice White, in speaking for the Court, in his summary of the provisions of the 1902 Act, notes:

> "The section in question (Sec. 1) as well as those following it, contain many administrative provisions for the enforcement of the taxes levied by the Act and concerning interstate and foreign commerce in the articles referred to".

The Court, in reaching the conclusion that the Act was constitutional and that it was not an un-

warranted encroachment upon, and an interference with the police powers reserved to the several states and to the people of the United States, concluded:

> *"In determining whether a particular Act is within a granted power, its scope and effect are to be considered.* Applying this rule to the acts assailed, it is self-evident that on their face, they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power." (195 U. S. 59) (Emphasis supplied)

It is to be noted that the Court declined to consider the contention urged upon it, that the motive of Congress was to regulate and not to tax, and rested the decision upon the conclusion reached by Mr. Chief Justice Fuller in *In Re Kollock* (165 U. S. 536) that

> "The Act before us is on its face, an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue".

Thus it appears that the intention of Congress, in enacting this statute, must be derived from the language of the whole act. The mere fact that a provision for regulation is included in the statute is certainly no indication, in and of itself, that Con-

gress intended to preempt the field of regulation, but must, we submit, be considered only as a provision by Congress for the enforcing of its taxing statutes."[7]

This Court, in *Whipple v. Martinson*, 256 U. S. 41, considered the identical proposition here presented. There considered was a statute of the State of Minnesota regulating traffic in narcotic drugs. One of the grounds of attack upon the statute was that it conflicted with the terms and provisions of the Federal Harrison Anti-Narcotic Drug Act, 38 Stat. at L., 785, and was, therefore, beyond the power of the State to enact. We think the parallel between the present case and the Whipple case so exact that, at the risk of overly extending this brief, we quote in extenso from Mr. Justice Day's opinion:

> "As to the alleged inconsistency between the state statute and the Harrison Anti-Narcotic Drug Act, the state court held that there was no substantial conflict between the two enactments. The validity of the Harrison Act was sustained by this court in *United States v. Doremus*, 249 U. S. 86, 63 L. ed. 493, 39 Sup. Ct. Rep. 214, as a valid exercise of the authority of Congress under the power conferred by the Constitution to levy excise taxes. The provisions of the statute regulating

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[7] Cf. *Magnano Co. vs. Hamilton*, 292 U. S. 40, 47.

[8] In *Kelly v. Washington*, 302 U. S. 1, at page 13, it is observed: "The fact that federal regulations were (are) numerous and elaborate does not extend them beyond the boundary they established."

the sale, dispensing, or prescribing of drugs were held to bear a reasonable relation to the collection of the taxes provided for, and to be valid although the statute affected the conduct of a business which was subject to regulation by the police power of the state.

"It may be granted that the state has no power to enact laws which will render nugatory a law of Congress enacted to collect revenue under authority of constitutional enactments. See *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39. But we agree with the state court that there is nothing in this statute which prevents enforcement of the revenue act in question. It is true that the provisions regulating the sale, dispensation, and disposition of the prohibited drugs are somewhat different in the two acts. The prohibitory measures of the Federal statute do not apply to the disposition and dispensation of drugs by physicians registered under the act in the regular course of professional practice, provided records are kept for official inspection. Under the state law physicians can only furnish prescriptions to addicts, and may not dispense the drugs to such persons at pleasure from stocks of their own.

"There is certainly nothing in this state enactment, as construed by the supreme court of Min-

nesota, which interferes with the enforcement of the Federal revenue law, and we agree with the state court that there is no conflict between the enactments such as will prevent the state from enforcing its own law upon the subject."

We have but to paraphrase the above statement to see its clear analogy:

"As to the alleged inconsistency between the state statutes (and the official procedure thereunder) and the Renovated Butter Act, the Circuit Court of Appeals held that there was no substantial conflict between the two. The validity of the Renovated Butter Act was sustained by this court in *McCray vs. U. S.*, 195 U. S. 27, as a valid exercise of the authority of Congress under the power conferred by the Constitution to levy excise taxes. The provisions of the statute regulating the manufacture and sale of renovated or process butter were held to bear a reasonable relation to the collection of the taxes provided for, and to be valid although the statute affected the conduct of a business which was subject to regulation by the police power of the state.

"There is certainly nothing in this state enactment (or the official procedure under it) as stipulated upon by counsel and as construed by the Circuit Court of Appeals, which interferes with the enforcement of the Federal revenue law, and there is no conflict between the enactments such as will prevent the state from enforcing its own law upon the subject."

2.

Assuming that the Renovated Butter Act was intended as a regulation of commerce, Congress has specifically indicated its will that renovated or process butter may be subjected to restrictions by the State, even though interstate commerce be affected.

Counsel in opening their argument in the brief here submitted (page 24) pose the following question:

"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"

We shall presently give our attention to this question. First, however, we counter with the following question:

"How could Congress more clearly have expressed its intent to authorize and permit state inspection and regulation of packing stock butter delivered to the manufacturing plant within the State?"

The language of the Renovated Butter Act is certain and definite in its authorization of state control of renovated or process butter, and in its denial to the taxpayers under the act of the right to carry

on their business contrary to state statutes or regulations.

The Renovated Butter Act, as above noted, imposes certain special taxes upon manufacturers of renovated or process butter, as well as upon wholesale or retail dealers in that product. It is expressly declared (Section 4, 32 Stat. 195)

> "And Sections *** 3243[*] of the Revised Statutes of the United States are, so far as applicable, made to extend to and include and apply to the special taxes imposed by this section and to the persons upon whom they are imposed."

Section 3243 of the Revised Statutes of the United States is as follows:

> "The payment of any tax imposed by the internal revenue laws for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the

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[*]Section 3243 of the Revised Statutes, Title Internal Revenue, is carried forward in the exact language as Section 3276 of the United States Internal Revenue Code of 1939 (U.S.C.A., Title 26), and is still in full force and effect.

payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes."

This Court has heretofore had occasion to consider the purpose of Congress in incorporating into a statute the provisions of Section 3243 of the Revised Statutes.

In *Plumley vs. Massachusetts*, supra, p. 466, it is stated:

"It is manifest that this section was incorporated into the act of August 2, 1886, to make it clear that Congress had no purpose to restrict the power of the States over the subject of the manufacture and sale of oleomargarine within their respective limits. The taxes prescribed by that act were imposed for national purposes, and their imposition did not give authority to those who paid them to engage in the manufacture or sale of oleomargarine in any State which lawfully forbade such manufacture or sale, or to disregard any regulations which a State might lawfully prescribe in reference to that article."

Attention is particularly directed to the fact that the Plumley case was decided some six years before the enactment of the Renovated Butter Act of 1902. It must be assumed, under the well established rule of statutory construction, that Con-

gress, in inserting the provision above quoted in Section 4 of the Renovated Butter Act of 1902, intended that a construction should be placed upon it similar to that given the identical provision in the Plumley case.

With this fact in mind, it is respectfully submitted that this Court can reach no other conclusion than that Congress intended to make it clear that the power of the States over the subject of the manufacture and sale of process and renovated butter within their respective limits was to be unrestricted, even though the effect of such regulation might be the imposition of an indirect burden upon interstate commerce.[11]

The incorporation into the Renovated Butter Act of Section 3243 of the Revised Statutes, Title Internal Revenue, is not the only specific indication of the Congressional intention to leave the State unrestricted in the exercise of its lawful police power. A further indication of the will of Congress that interstate commerce might be subjected to restrictions on the part of the States, with respect to the regulation of process or renovated butter, is the provision contained in Section 1 of the Act:

"That all articles known as oleomargarine, butterine, imitation, process, renovated, or adulter-

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[11] *Austin vs. Tennessee*, 179 U. S. 343, 363; *Schollenberger vs. Pennsylvania*, 171 U. S. 1;, 28; *Savage vs. Jones*, 225 U. S. 501.

ated butter, or imitation cheese, or any substance in the semblance of butter or cheese not the usual product of the dairy and not made exclusively of pure and unadulterated milk or cream, transported into any State or territory or the District of Columbia, and remaining therein for use, consumption, sale, or storage therein, shall, upon the arrival within the limits of such State or Territory or the District of Columbia, be subject to the operation and effect of the laws of such State or Territory or the District of Columbia, enacted in the exercise of its police power to the same extent and in the same manner as though such articles or substances had been produced in such State or Territory or the District of Columbia, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (32 Stat. 193)

Here again, we find Congress adapting to the Renovated Butter Act of 1902, the provisions of another statute which had been construed by this Court. The provisions of Section 1 of the Renovated Butter Act are identical in every respect (save the changes made to conform the provisions to the nature of the subject dealt with) to the provisions of the Act of Congress of 1890, the so-called Wilson Act (26 Stat. 313) which provided:

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use,

consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (p. 205)

The obvious purpose of inserting Section 1 into the Renovated Butter Act of 1902 was clearly to assert the Congressional intention that the State might act to protect the health of its citizens with respect to unclean butter, even though such butter, renovated or packing stock, might still remain in the original packages in which it had been introduced into the State."

In *In re Rahrer* 140 U. S. 545, this Court, in considering the effect of the provision of the Wilson Act above quoted, after noting that the act provided that imported liquors should be subject to the operation and effect of the State laws to the same extent and in the same manner as though the liquors had been produced in the State, observed:

"Indicative of the Congressional thought concerning the addition of Section 1 to the Renovated Butter Act of 1902, are statements of Sen. Spooner, an advocate of the bill. Congressional Record, Senate Volume 35, Part 4, pp. 3604, 3605, Fifty-seventh Congress 1st Session). (See Appendix page 59.)

"Appellant was thereby prevented from claiming the right to proceed in defiance of the law of the State, upon the implication arising from the want of action on the part of Congress up to that time. The laws of the State had been passed in the exercise of its police powers, and applied to the sale of all intoxicating liquors whether imported or not, there being no exception as to those imported, and no inference arising, in view of the provisions of the state constitution and the terms of the law, (within whose mischief all intoxicating liquors came), that the State did not intend imported liquors to be included. We do not mean that the the intention is to be imputed by violating any constitutional rule, but that the State law should not be regarded as less comprehensive than its language is, upon the ground that action under it might in particular instances be adjudged invalid from an external cause. (140 U. S. 564)

A like conclusion is reached in *Clarke Distilling Company vs. Western Maryland Ry.*, 242 U. S. 311, involving the so-called Webb-Kenyon Law.

It must be remembered, too, that the Renovated Butter Act of 1902 is captioned, in part,

"An act to make oleomargarine, and other imitation dairy products, subject to the laws of any State or Territory or the District of Columbia into which they are imported."

It is earnestly submitted that each of the provisions of the statute and the title of the statute, to which reference has been hereinabove made, clearly indicate that Congress was not concerned with interfering, nor in attempting to interfere, with any of the states in the matter of regulating the purity of the kind of product here considered. Simply stated, these provisions manifest the understanding of Congress that the nature of the subject is not such as to require exclusive legislation. Cf. *Hartford Accident and Indemnity Co. v. Ill.*, 298 U. S. 156, 159.

But, it has been argued below by petitioner, Congress did not, by the insertion of Section 1 of the Act, make raw materials for manufacture into butter subject to state laws. The weakness of this contention is self-apparent. This Court, in *In re Rahrer*, 140 U. S. 545, 557, recognized the right of a state, as an incident to its power to regulate, to "use means to ascertain the fact(s)". Of consequence, as observed by the Circuit Court of Appeals of the Fifth Circuit, in its opinion in this cause, it should not be implied from the statute that the Congress which had declared that the finished product, when introduced into a State, would be subject to the laws of that State, intended by that same act to exclude the State of manufacture from the regulation of ingredients used in the manufacture, with the result that persons might set up as manufacturers in particular states under the protection of Congress and then import into them and use, in the manufacture of food products therein, impure or unfit products,

free from inspection by and regulations of, the State, designed to prevent such importation and use.

Or, in other words, stating the necessary result of the argument of counsel from a concrete consideration of the particular subject here involved, that though Congress, in enacting the Renovated Butter statute, had considered the nature and character of our dual system of government, State and Nation, and instead of absolutely prohibiting, had so conformed its regulation as to produce cooperation between the local and national forces of Government, to the end of preserving the rights of all, it had thereby removed from the States control over the packing stock butter which might or might not later be used in the manufacture of process or renovated butter shipped partially in interstate commerce and partially sold in Alabama. The abnormal result to which this argument leads is at once apparent. It was obvious to the Circuit Court of Appeals, and it can be none the less obvious to this Court, that the argument of petitioner virtually comes to the assertion that in some undisclosed way, by the exertion of Congressional authority, seeking to convey additional powers to the States, or to remove restrictions on existing powers, power once possessed by the State of Alabama, has evaporated."

We do not believe that this Court will be influenced by such an argument.

"Cf. the logic employed by Chief Justice White in *Clark Distilling Co. v. Western Maryland Ry.*, 242 U. S. 311, 327-28.

It is, therefore, earnestly insisted that since Congress has clearly indicated its recognition of the right of the State of Alabama to regulate the manufacture and sale of renovated or process butter, the Court of Appeals was correct in declining to find in the statute radiations beyond the obvious meaning of the language therein used."

3.

Assuming that the Renovated Butter Act is "regulation of commerce" and that Congress has not specifically indicated its will to allow state restrictions, nevertheless the Act does not operate to render inoperative the States' right of control in cases of this kind.

We have previously referred to the question posed by counsel for petitioner. We now propose to answer it. The question asked is: (Brief p. 24)

"What more could Congress do than it has done to exclusively occupy the field of inspection of raw materials in interstate commerce going into the manufacture of process or renovated butter?"

A further question presented is:

"What may the State of Alabama do in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture of the

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"*Federal Trade Commission v. Bunte Bros., Inc.*, No. 85, decided February 17, 1941.

United States is not authorized to do by the Federal law and the regulations, which have the force and effect of law, promulgated pursuant to the mandate of the Federal Statute?"

The Court cannot fail to observe that whereas counsel have stated in their Proposition A (Brief p. 23) that:

> "Congress has preempted the field of *inspection and regulation* of packing stock butter in interstate commerce" (Emphasis supplied)

the questions propounded as the core around which they proceed to wind their argument include reference to inspection only. They ask:

> "What more could Congress do *** to exclusively occupy the field of *inspection*?" and "What may the State of Alabama do in the way of *inspecting* *** ?" (Emphasis supplied)

Nowhere in the brief is there presented evidence to show preemption of the *regulatory* field by the Federal Renovated Butter Act. That this also is necessary is apparent when we look to the prayer of the bill for injunction (R. pp. 18, 19). Its broad aspects cannot be overlooked in determining the issues here presented.

So it is evident that even though both questions are answered as petitioner would have them answered (i e., Congress could have done no more than it has done to exclusively occupy the field of inspection,

and the State of Alabama may do nothing in the way of inspecting raw material in interstate commerce going into the manufacture of process or renovated butter that the Secretary of Agriculture cannot do), petitioner has still failed to establish his proposition that "Congress has preempted the field of inspection *and regulation* of packing stock butter in interstate commerce." (Emphasis supplied)

If counsel cannot establish that there exists a *regulation* of packing stock butter, then of course, petitioner has no standing whatsoever. For certainly the mere right of Federal inspection of packing stock butter cannot exclude State regulatory action. Inspection without power to take action where the findings warrant it certainly affords no protection to the citizens of Alabama. Where then are they to look for protection? Obviously only to the *State* authorities constituted and empowered to provide it.

We have stated that counsel for petitioner have failed to point out wherein there exists in the Renovated Butter Act power to *regulate* packing stock butter as such. We believe their neglect in this regard is certainly not attributable to a lack of willingness on their part to do so; rather, we believe the omission is due to the impossibility of the task. This impossibility is best demonstrated by a consideration of the statute and the regulations adopted thereunder.

In considering the statute and regulations in our search for this alleged exclusive power to regulate packing stock butter, we must ascertain two facts:

(1) What has Congress done by law?

(2) What has the Secretary of Agriculture done pursuant to such law?

The "regulatory" provisions of the statute are as follows:

"And the Secretary of Agriculture is hereby authorized and required to cause a rigid sanitary inspection to be made, at such times as he may deem proper or necessary, of all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, and of the products thereof and materials going into the manufacture of the same. *** and shall cause to be ascertained and reported from time to time the quantity and quality of process or renovated butter manufactured, and the character and condition of the material from which it is made. And he shall also have power to ascertain whether or not materials used in the manufacture of said process of renovated butter are deleterious to health or unwholesome in the finished product, and in case such deleterious or unwholesome materials are found to be used in product intended for exportation or shipment into other States or in course of exportation or shipment he shall have

power to confiscate the same." (Section 5, Act of May 9, 1902; 32 Stat. 196)

From these provisions it appears that Congress has authorized and *required* the Secretary of Agriculture (1) to cause a rigid sanitary inspection to be made of renovated or process butter plants and of the products thereof and the materials going into the manufacturing; (2) to report the *quantity* and quality of process of renovated butter manufactured; (3) to report the condition of the material from which it is made.

It has given the Secretary of Agriculture the *power*, but has *not required* him, (1) to ascertain whether the materials used in the manufacture of process or renovated butter are deleterious to health or unwholesome *in the finished product*; to confiscate the *finished product* if deleterious or unwholesome materials are found to be used in it.

Neither the Regulations of the United States Treasury Department, Bureau of Internal Revenue, as revised April, 1936 (Appendix p. 62), nor the regulations adopted by the United States Department of Agriculture and issued December 24, 1936 (petitioner's Appendix to Brief, p. 79), extend beyond the authorization of the law above noted, and quite properly so.

Counsel has referred to the Revenue Act of 1912 incorporating by reference, in the Renovated Butter

Act, the provisions of the Meat Inspection Act, but they fail to particularly point out any provision thereof which grants to the Secretary of Agricuture power to *regulate* packing stock butter as such, including the power to seize and confiscate such butter in its packing stock form. Our study of this act reveals no attempt to confer such power.

Our examination of the statutes and regulations which petitioner insists have given the Secretary of Agriculture the exclusive power to control packing stock butter delivered to a manufacturing plant in Alabama therefore reveals a delegation of power and a mandate to *inspect* only.

There is *no* attempt on the part of Congress to *regulate* packing stock butter nor to authorize the Secretary of Agriculture to *regulate* it.

It cannot be too clearly emphasized that while inspection work is a means to accomplish regulation, it is not regulation itself.

Outside of the penalties in the act directed against the failure of payment of the taxes levied and the failure to keep proper records, the only regulatory force placed in the hands of the Secretary of Agriculture is the grant of *power* to confiscate renovated or process butter, *not* the packing stock, in interstate commerce. There is even here no *mandate* to confiscate!

Nowhere in the statute or regulations is regulatory action directed against the material, the packing stock butter, from which renovated or process butter is made. True, in Sections 1 and 2 of Reg. 4 of B. D. I. Order No. 1 (petitioner's Brief, Appendix p. 85), it is provided:

> "Section 1. 'Rigid' sanitary inspections will also be made of the character and condition of the materials going into the manufacture of process or renovated butter and of the quantity and quality of process or renovated butter manufactured.
>
> "Section 2. Due care must be taken to prevent process of renovated butter, in any state of its manufacture, from falling on the floor, and in the event of its having so fallen, the soiled portion shall not be used. Butterfat collected from floors, drains, or catch basins shall not be used in the manufacture of process or renovated butter."

but nowhere in the statute or regulations do we find appropriate provision (either authority to confiscate or prosecute) for enforcement. Indeed, we take it, no such provision could be validly included in the regulations, there being an absence of statutory authority therefor. *U. S. v.* 11,150 *Pounds of Butter*, 195 Fed. 657, 664.

It is upon this statute with its limited effect and restricted scope that petitioner bases its contention that officials of the State of Alabama should be ex-

cluded from inspecting its plant and its packing stock butter. It is this statute which petitioner says warrants a denial of the right of the State officials to inspect its plant or storehouse, its packing stock butter or other materials employed in the making of renovated or process butter.

Petitioner advances these contentions in the face of an admitted sale in Alabama of at least ten per cent of its output of renovated or process butter.

The Circuit Court of Appeals recognized this proceeding for what it is: an action by petitioner "attempting to magnify and enlarge the actual scope of the federal law, to use it as a shield against or a cat's paw to draw his chestnuts from the fire as to state regulations".

We submit, however, that petitioner's scheme is doomed because of the utter lack of evidence either tending to show a Congressional intention to exclude the state officers from the field or tending to show that the State Statutes or the method of enforcement thereof interfere with the enforcement of the Federal law.

C.

The decisions of this Court establish the doctrine that state officers enforcing by seizure police regulations with regard to foods will not be enjoined merely because there exist similar Federal laws and regulations in respect to the same subject matter and there has been no Federal seizure.

Taking our cue from this Court we have first considered the provisions of the statutes and the regulations here at issue—this upon the theory "that the proper point of beginning in the consideration of the scope of any disputed statute (or regulation) is with the words of the statute itself".

We now come to a consideration of the general principles upon which this case is to be decided. Petitioner relies in the main upon the following cases to support his position that the Renovated Butter Act operates to exclude state officials from inspecting petitioner's plant and from inspecting or seizing petitioner's packing stock butter:

Napier v. Atl. Coast Line R. R. Co., 272 U. S. 606;
Northern Pacific R. R. v. Wash., 222 U. S. 370;
Southern R. R. v. Reid, 222 U. S. 424;
Missouri-Pacific R. R. v. Stroud, 267 U. S. 404;
L. & N. R. R. Co. v. State, 16 Alabama App. 199;
C. R. I. & P. v. Hardwick Co., 226 U. S. 426;
Adams Express Co. v. Croninger, 226 U. S. 491;
Erie R. R. v. New York, 233 U. S. 671;
New York Central R. R. v Winfield, 244 U. S. 147;
Erie R. R. Co. v. Winfield, 244 U. S. 170;
Charleston & W. C. R. R. Co, v. Varnville Furniture Co., 237 U. S. 597
Mo. Pac. Co. v. Porter, 273 U. S. 341.

} Hereinafter called the "Railroad Cases".

Hines v. Davidowitz, 85 L. ed. 366;

Oregon-Wash. R. R. Co. v. Wash., 270 U. S. 87;

(Petitioner's Brief, pp. 14-17.)

Counsel is insisting that the Circuit Court of Appeals fell into error in applying to the facts in this case, as analogous, the cases of *Mintz vs. Baldwin*, 289 U. S. 346; *Pacific States Co. vs. White*, 296 U. S. 176; *Kelly vs. Wash.*, 302 U. S. 1; *S. C. Highway Department vs. Barnwell Bros.*, 303 U. S. 177; *Townsend vs. Yeoman*, 301 U. S. 441; and *Currin vs. Wallace*, 306 U. S. 1, rather than the cases upon which petitioner now relies.

It will not be here denied that in each of the cases relied on by petitioner this Court has held a Federal statute exclusive in its own field. It will not be denied that in each of the cases State action has been held to have been superseded by Federal legislation.

We do not think, however, that any of the cases upon which petitioner relies, are here controlling. To paraphrase Mr. Justice Douglas' comments in *Nelson v. Sears Roebuck and Co.*, No. 255, decided February 15, 1941, 85 L. ed. 525:

> "Particular facts of specific cases determine whether a given statute preempts State regulation indirectly affecting interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever embedded in general propositions, does not facilitate an answer to the present problem."

A brief consideration will suffice to illustrate the vast disparity of both fact and logic between the line

of cases upon which petitioner rests his claim and that upon which the Court of Appeals and this Brief proceed.*

Typical of the cases cited by petitioner, is the *Napier* case, 272 U. S. 606. Typical of the cases relied on by the Court of Appeals and by appellee, is *Mintz vs. Baldwin*, 289 U. S. 346. Let us examine these two cases and the rationale of each. Let us compare them in their essential facts.

The *Napier* case concerned itself with the construction of the Federal Locomotive Boiler Inspection Act. The question was whether that act had occupied the field of regulating locomotive equipment used on a highway of interstate commerce so far as to preclude State legislation.

The *Mintz* case considered the Cattle Contagious Diseases Acts. The question there was whether those acts precluded State legislation on like subjects.

In the *Napier* case, the State of Georgia had enacted statutes prescribing an automatic door to the fire box and a cab curtain for use on locomotives. In the *Mintz* case, the State of New York had enacted a statute requiring that cattle should not be imported for dairy or breeding purposes without a certificate certifying them to be free from disease.

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*Excellent reviews of the decisions of this Court relating to the supersedure of state laws by Federal statutes and regulations are found in the following legal periodicals:

41 Harv. L. Rev. 200; 37 Col. L. Rev. 43; 34 Col. L. Rev. 995, 1027, 1038; 46 Yale L. J. 599; 86 Penn. L. Rev. 532; 12 Minn. L. Rev. 607.

In neither the *Napier* case nor the *Mintz* case had Congress, by specific language directed to that end, covered the particular action taken by the State.

But in the *Napier* case it was held that the Boiler Inspection Act "was intended to occupy the field", whereas in the *Mintz* case, the Court declined to find that the entire field had been occupied, and instead, found a field of operation for the State statute.

Why this distinction?

In the *Mintz* case it is stated,

> "The purpose of Congress to supersede or exclude action against the ravages of disease is not lightly to be inferred. The intention so to do must definitely and clearly appear".

It is to be seen, therefore, that the cases fall into several different categories.

In the first category, it seems, are those cases where the power of Congress is absolutely exclusive. These are the cases where the subjects are national in their character or admit only of one uniform system or plan of regulation. *Gilman vs. Philadelphia*, 3 Wall. 713; *Brown vs. Houston*, 114 U. S. 622; *Leisy vs. Hardin*, 135 U. S. 100; *Robbins vs. Shelby County Taxing Dist.*, 120 U. S. 489; and *Hines v. Davidowitz*, supra, are a few of the many cases announcing this principle. The case with which we are now concerned obviously does not fall under this first category.

A second classification of cases includes those where matters of local concern are involved. These are the cases with which we now deal. In considering the opinions treating these cases, said to be of local concern, we see that this second classification has been further subdivided by this Court. In one series of cases, the Railroad cases, of which the *Napier* case is typical, the Court has found that Congress has preempted the field. In the other group of cases, of which *Mintz vs. Baldwin* is typical, a different view is obtained. One clue to this distinction has been quoted above from the *Mintz* case.

A further clue to the basis for the distinctions made is found in *C. R. I. Ry. Co. vs. Hardwick Elevator Co.*, 226 U. S. 426, 435, wherein it is stated that insofar as legislation relating to railroads is concerned, the State "had no inherent, but only permissive power". 226 U. S. 435. In *Adams Express Co. vs. Croninger*, 226 U. S. 491 at p. 506, the Court remarks with respect to the right of the State to regulate the liability of a carrier for a loss or damage of property carried,

> "Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts".

Again, in *Missouri Pacific vs. Porter*, 273 U. S. 341, we find it stated with respect to the power of Congress over railroads, that,

"Its power to regulate such commerce and all instumentalities is supreme". 273 U. S. 346.

It will be seen, therefore, that each of the Railroad Cases cited by counsel for petitioner pivot on the proposition that the State *had no inherent right to regulate the subject*, and that once Congress had spoken, the State must remain inactive. This Court has treated these cases as a group and as each new set of facts arises, has applied to it the rules formulated to govern the group.

The case of *Oregon-Wash. R. R. v. Wash.*, 270 U. S. 87, seems to stand alone in the decisions of this Court. Since the holding, there has been much speculation by writers that this Court would be more hesitant to assume such a strict construction of the application of the doctrine of occupancy of the field of action. In the cases of *H. P. Welch Co. v. State of New Hampshire*, 306 U. S. 72; *Eichholz v. Public Service Commission*, 306 U. S. 268; and *Maurer v. Hamilton*, 309 U. S. 598, there is a decided indication that this speculation has turned into reality. These cases seem to agree that no sound reason can be given for the rule that where the effectiveness of Congressional legislation has been postponed in a field of action affecting the vital interests of a state, the state's power to act has been precluded, when state regulations in no way conflict with, hinder, embarrass or obstruct federal authority. The recent authority has shown that the supersedure of state authority may be held to occur where there

is *effective* Federal action, but not until that point has been reached.

The case of *Prigg vs. Pennsylvania*, 16 Peters 539, represents another category into which these cases may be placed. There, the State legislation considered operated in conflict with an implied prohibition in the Constitution. It was there held that a statute of Pennsylvania making it a felony to take and carry negroes for the purpose of returning them as slaves, interfered with the right of the owner to reclaim his slaves, which right was derived from the Constitution of the United States. The line of cases represented by the Prigg case rest on the proposition that no state may trench on the province of Congress to determine whether the paramount interest of the nation demands nation-wide or local action—for Congress is particularly charged by the Constitution with the responsibility for these functions of government.

The cases upon which the Circuit Court of Appeals lays its decision, and the additional authorities to a like view collected in this brief, and upon which we rely to support the proposition stated at page 36, rest on a construction of statutes involving action by states in matters in which they have an inherent right to act. Matters involving the health of their

citizens." Matters involving action by the State directed to the protection of its citizens from fraud and deceit." State measures intended to mitigate the destruction of life, limb, or property and definitely to insure the safety of its citizens."

The right exercised by the states in these cases depended neither on the action nor on the inaction of Congress. The subjects regulated in each of them were not essentially matters of national concern. The states did not act through the permission of Congress. In each of them the state's right to regulate the subject considered was upheld despite vigorous protests that "Congress had entered and preempted the field". . .

"*Plumley vs. Massachusetts*, 155 U. S. 461 (oleomargarine colored to look like butter); *Crossman vs. Lurman*, 192 U. S. 189 (adulterated coffee; this case involves foreign commerce); *Sligh vs. Kirkwood*, 237 U. S. 52 (immature fruits unfit for human consumption); *Savage vs. Jones*, 225 U. S. 501 (involving a statute requiring a statement of ingredients contained in butter products); *Asbell vs. Kansas*, 209 U. S. 251 (inspection of diseased cattle); *Reid vs. Colorado*, 187 U. S. 137 (penalizing the importation of cattle); and Cf. *Carey vs. So. Dakota*, 250 U. S. 118 (protection of migratory birds).

"*Corn Products Ref. Co., vs. Eddy*, 249 U. S. 427 (label of syrup compounds); *Hebe Co. vs. Shaw*, 248 U. S. 297 (labeling of condensed milk); *Merchants Exchange vs. Missouri*, 248 U. S. 365 (weighing of grain); *Townsend vs. Yeomans*, 301 U. S. 441 (maximum charges for the sertices of warehousemen); *Pacific States Co. vs. White*, 296 U. S. 176 (regulating standards for the containers in which horticultural products are marketed); *Powell vs. Pennsylvania*, 127 U. S. 678 (prevention of deception in sales of butter and cheese).

"*Welch Co. vs. New Hampshire*, 306 U. S. 72 (regulation of time of service of drivers of motor carriers); *S. C. Highway Department vs. Barnwell Bros.*, 303 U. S. 177 (limitation of width and weight of vehicles used on highways); *Maurer vs. Hamilton*, 309 U. S. 598 (car over cab method of transportation restricted); *Kelly vs. Wash.*, 302 U. S. 1 (prevention of operation of unsafe or unseaworthy vessels); *Missouri P. R. Co. vs. Norwood*, 283 U. S. 249; 257 (safety of train crews).

The instant case is compatible with the above authorities in the nature of the subject regulated and in the absence of need for Congressional permission to begin action. It is submitted, therefore, that it should be controlled by the rule of these authorities rather than those relied upon by petitioner, shown to rest on distinctly different theories.

Counsel's argument that the test stated by the Circuit Court of Appeals and styled by counsel the "Compliance-Defiance" test, has been repudiated or rejected is without substantiation in cases involving State action under its police power to protect the health and safety of its citizens under circumstances involving local control. On the contrary, in such cases the test has been repeatedly applied.* For instance, in *Hartford Accident and Indemnity Co. v. Ill.*, 298 U. S. 155, the "Compliance-Defiance" test appears in the following language:

> "The appellant urges, however, that Congress has adopted an act regulating the same business and the Cross Company was required to take a license under that act. This alone is not sufficient to nullify the state law, if the Federal act does not cover the same field, *or is consistent with it.*"

In *Carey v. State of South Dakota*, 250 U. S. 119, 122, the same test is applied, the Court stating:

> "The intent to supersede the exercise by a state of its police powers is not to be implied unless the

*See many cases cited by Mr. Justice Stone in the dissenting opinion in *Hines v. Davidowitz*, No. 22, 1940 Term; 85 L. ed. at page 379.

act of Congress, fairly interpreted, is in actual conflict with the law of the state."

We do not deny that the "Compliance-Defiance" test has not been applied in the Railroad Cases upon which the petitioner relies, or in the case of *Oregon-Wash. R. R. Co. vs. Wash.*, 270 U. S. 87, considered supra. We think, however, that we have successfully shown the factual and legal distinction between these cases and those upon which we rely.

It is, therefore, earnestly insisted that the applicable authorities sustain the contention here urged that the State's action, being bottomed on the broad base of the protection of public health and welfare does not stand "as an obstacle to the accomplishment of the full execution of the purposes and objectives" of the Act of Congress, known as the Renovated Butter Act of 1902, and consequently its exercise should not be restricted by this Court."

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*Cf. *Hines v. Davidowitz*, No. 22, decided January 20, 1941, 85 L. ed 366, 372.

II

THE CIRCUIT COURT OF APPEALS DID NOT ERRONEOUSLY FAIL TO FOLLOW THE CONSTRUCTION PLACED ON THE AGRICULTURAL CODE BY THE SUPREME COURT OF ALABAMA IN *STATE VS. CECIL*, 216 ALA. 391.

Petitioner's insistence that the Supreme Court of Alabama in *State vs. Cecil*, 216 Alabama 391, has held that the enactment of the Agricultural Code was within the exercise of the police power of the State, but that the operation of the Code was confined to intrastate commerce, (Brief p. 50) reveals that petitioner has apparently overlooked two facts.

The first fact is that the Supreme Court of Alabama in the *Cecil* case did not consider the *entire* Agricultural Code, but limited its considerations to Article 23 of the 1923 Act (Act No. 376, H. 570, approved September 27, 1927, General Acts of 1923, p. 463), which act the Court refers to as the "Agricultural Code of 1923".* It is obvious that the Agricultural Code of 1927, which became effective on October 1, 1927, could not have been the subject of discussion in a decision rendered on April 7, 1927, as was the decision in the *Cecil case*. It is clear too, from an examination of the Agricultural Code of 1927, that Article 23 of the Agricultural Code of

*Copies of both the Agricultural Code of 1923 and the Agricultural Code of 1927 have been filed in the office of the Clerk of this Court for convenient reference by the Court.

1923 appears in the Agricultural Code of 1927 as "Article 25", rather than "Article 23".[*]

It is apparent, therefore, that the Supreme Court in the *Cecil* case, considered only the provisions of the Agricultural Code of 1923 relating to the sale of farm products on commission,[**] and nothing therein can be deemed to indicate an intention to construe Article 23 of the Agricultural Code of 1927, (relating to suspension from sale of articles seized) or Article 7 of the Agricultural Code of 1927 (relating to the misbranding or adulteration of foods and drugs).[***]

The second fact to which we have alluded above is equally as obvious. Assuming for the sake of argument that the Supreme Court of Alabama, had it been called upon to consider Articles 7 and 23 of the

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[*]See Agricultural Code of Alabama, 1927, pp. 278-288.

[**]Article 25 of the 1927 Agricultural Code.

[***]Since this case was submitted to this Court, Alabama has adopted a new Code of laws, known as Code of Alabama, 1940. Tit. 2, Sec. 314 of this Code brings forward into the article particularly relating to foods (article 18) Section 4396 of the Alabama Code of 1923. This section is as follows:

"§314. (4396). *What is prima facie evidence of intent to violate article.* —The having in possession by any person, firm, or corporation who manufactures or exposes for sale any adulterated or misbranded food within the meaning of this article, shall be prima facie evidence of having in possession with intent to sell in violation of its provisions, *except that any manufacturer, wholesaler or jobber, may keep properly identified goods specially set apart in his stock for sale in other states which might otherwise be in violation of the provisions of this article.*" (1919, p. 1031.)

This provision affords petitioner ample protection against seizure by state officials of packing stock butter specially set apart for sale in other states, thus obviating any necessity for the injunction here sought. Especially is this true, in view of the fact that petitioner does not contend here, nor has he ever so contended that he is conforming to this statute.

Agricultural Code of 1927, would have given voice to the same views expressed in dealing with Article 23 of the Agricultural Code of 1923 (now Article 25 of the Agricultural Code of 1927), we are unable to perceive that it has limited State action upon matters of this kind. At most, it can be contended only that the Supreme Court of Alabama has held that the State act is not aimed directly at interstate commerce. This we do not deny. In fact, the entire burden of this brief is directed to a similar argument. We have contended throughout this brief that where the State act affects interstate commerce, it does so only incidentally and within a permitted field. This Court has many times determined that while a statute may not, considered in its own nature, operate as a regulation of interstate commerce, the same act may none the less affect commerce incidentally.*

The cases of *Stafford vs. Wallace*, 258 U. S. 495; *Dahnke-Wallace Milling Co. vs. Bondurant*, 257 U. S. 282; and *Chicago Board of Trade vs. Olsen*, 262 U. S. 1 cited by counsel for petitioner (Brief p. 51) in support of the argument that packing stock butter stored in petitioner's plant and mixed with other butter acquired in Alabama for manufacture into the finished product for sale and shipment, remains in interstate commerce, furnish no support for such a contention. In each of these cases the subjects dealt

*Cf. *Smith vs. Ala.* 124 U. S. 465, 482; *Minn. Rate Cases*, 230 U. S. 352; *S. C. Highway Dept. vs. Barnwell Bros.*, 303 U. S. 177.

with were "in the middle of the current of commerce". The stopping point in the states was considered to be merely a "throat through which the current flows". Such is obviously not the case here. Here the journey was ended for the packing stock butter. To paraphrase this Court's statement in *Bacon vs. Illinois*, 227 U. S. 504, at p. 516, "the property (the butter) was held by the petitioner for his own purposes and with full power of disposition".

It is, therefore, earnestly but respectfully submitted that the dissent of Judge Foster and the argument of counsel upon the proposition that the Court of Appeals erroneously failed to follow the Supreme Court of Alabama, fall of their own weight.

CONCLUSION.

In conclusion, therefore, it is submitted: First, that the statute of Alabama, the operation of which is attacked, is not, considered in its own nature, a regulation of interstate commerce even when applied as in the case under consideration; Secondly, that both the act and the administrative procedure thereunder are properly within the scope of the admitted power reserved to the State of Alabama, and inherent in this state, to protect the health and welfare of its citizens and those of other States who might suffer because of the actions of its citizens; Thirdly, that so far as the statute, and the adminis-

trative procedure following it, affect transactions of commerce among the States, they do so only indirectly, incidentally, and remotely, and not so as to burden or impede them; and Finally, in the particulars in which such statute and such procedures under it touch those transactions at all, neither the statute nor the procedure is in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence.

Upon these reasons we base our contention that the judgment of the Circuit Court of Appeals for the Fifth District, which in effect denied to appellant the injunction by which appellant sought to restrain State officers from employing the most direct means of protecting the citizens of Alabama from injury or graud possibly resulting from the sale in Alabama of appellant's renovated or process butter, should be affirmed.

Respectfully submitted,

THOMAS S. LAWSON,
Attorney General of Alabama

WILLIAM H. LOEB,
Assistant Attorney General.

APPENDIX

AGRICULTURAL CODE OF ALABAMA OF 1927

Section 36. *Misbranding and Adulteration of Foods and Drugs.*—The purposes of this Article are to prevent the manufacture, possession, sale or delivery of adulterated or misbranded food and drugs, and for other purposes. The State Board of Agriculture shall have the power and authority, and it shall be its duty: (a) To promulgate all rules and regulations necessary to the accomplishment of the purposes of this Article and make effective its provisions; (b) To fix the standards of purity for all food and drug products which shall be, so far as practical, in accordance with the standards promulgated by the Federal Government through its duly authorized agents.

Section 37. *Possession: Sale and Delivery of Prohibited Articles.*—No person within this State shall manufacture for sale therein, have in possession with intent to sell, offer for sale, sell, or deliver any article of food or drugs which is adulterated or misbranded within the meaning of this Article.

Section 38. *Definition of Words and Terms.*—The word "article" when referring to food or drugs, is used in the broad and comprehensive sense and has reference to the food product or the drug product in question. The term "food" as used herein shall include all articles of food, drink confectionery,

or condiment, whether simple, mixed or compound, used or intended for use by man or domestic animals. The term "drug" as used herein shall include all medicines and preparations recognized in the U. S. Pharmacopoeia or National Formulary for internal or external use and any substance or mixture of substances to be used for the cure, mitigation or preventation of disease in man or domestic animals. The words "standard of purity or quality" herein used shall refer to and include the standards of purity for food products promulgated by the State Board of Agriculture and statutes of this State.

Section 39. *Adulteration of Food.*—An article shall be deemed adulterated in the case of food. First. If any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength. Second If any substance has been substituted wholly or in part for the article. Third. If any valuable constituent of the artcile has been wholly or in part abstrated. Fourth. If it be mixed, colored, powdered, coated, stained, or otherwise treated in a manner whereby damage or inferiority is concealed, or in a manner whereby the appearance of said Article is improved; provided this shall not apply to the precoloring or processing of fruits where such precoloring or processing does not conceal damage or inferiority. Fifth. If it contains any poisonous or deleterious ingredient which may render such article injurious to health; Provided, that when in the preparation of food products for shipment they

are preserved by an external application applied in such a manner that the preservative is necessarily removed mechanically, or by maceration in water, or otherwise, and directions for the removal of said preservative shall be printed on the covering of the package, the provisions of this Article shall be construed as applying only when said products are ready for consumption. Sixth. If it consist in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter. Seventh. If in the course of its preparation of manufacture an ingredient of inferior food value has been substituted in whole or in part for an ingredient of greater food value. Eighth. If it does not conform to the standard of purity or equality established for the article.

Section 217. As Amended by General Acts 1935 pp. 1102, 1103. *Section* 217.—*Suspension of Sale of Article.*—If at any time the Commissioner or his duly authorized agent, shall have reason to believe that any product or products or article mentioned in the succeeding sections of this Article, which are held in possession, delivered, kept, offered or exposed for sale in this State, do not comply with the requirements of this Article or other Article of this Code as to ingredients, substance, analysis, marking or labelling, weight or measure of the same, it shall be his duty by written order to suspend the sale of the same until he shall have satisfied himself, or

shall be satisfied by an analysis, or otherwise, that such product or article is made up, compounded or marked as required by law and rules and regulations under authority of law. If he shall find that the same dose not comply with such laws and rules and regulations, either before or after the making of such suspension order, then he is authorized to proceed with regard to the same as provided in the succeeding Sections of this Article, or he may order in writing the same to be held at his disposition pending the placement of such product or article in such condition as will met the requirements of such laws, rules and regulation, under the supervision and direction of the Commissioner or his duly authorized agent, or at the discretion of the Commissioner proceeding with regards to the same as provided in the succeding Sections of this Article. Provided in case the owner of such product or article denies by written notice to the Commissioner or his agent that the same is not in compliance with the laws, rules or regulations and requests a hearing thereon, the Commissioner or his agent shall as soon as practicable thereafter proceed as provided in the succeeding Sections of this Article, in order that the Court may hear and decide said issue and proceed as provided for in the succeeding Sections of this Article. Any person who moves, transports, sells or in any other manner disposes of any product or article after such product has been ordered suspended or held as hereinbefore provided shall be guilty of a misdemeanor and upon conviction thereof fined not more than Five Hundred ($500.00) Dollars or imprisoned for

not more than six months or both, provided that such product or article may be moved, transported or otherwise disposed of by and in compliance with written order by the Commissioner.

Section 218. *Proceeding to Condemn Seized Article.*—Any fertilizer, fertilizer material, ground limestone, paint, white lead, linseed oil, turpentine, kerosene or other illuminating oils, gasoline, benzine or other liquid motor fuels, insecticides and fungicides, commercial feeds, agricultural seeds, eggs, vinegar, sausage, milk, cream, ice cream or other dairy products, imitation butter and cheese, or any article of food or drug which is adulterated, misbranded or under standard, grade, weight or measure claimed within the meaning of any provision of this Code, and which is manufactured for sale, held in possession with intent to sell, offered or exposed for sale, or sold or delivered within this State, shall be liable to be proceeded against in the Circuit Court of the County where the same is found and seized for confiscation by writ of attachment for condemnation. Such writ shall issue upon the sworn complaint of the Commissioner or his duly authorized agent, taken by an officer authorized to administer an oath to the effect that such articles or product is adulterated or misbranded or is under standard, grade, weight or measure claimed, as the case may be within the meaning of this Article. The said sworn complaint by said Commissioner or his duly authorized agent, may be amended at any stage of the proceedings. Said writ shall be returnable in five days to

the Court issuing the writ; such Court shall hear and decide whether the allegations of the complaint are true and whether said article or product shall be condemned and confiscated. Such hearing shall not be had until five days' notice of the date therefor shall have been served on the owner, his agent, or any other party having an interest in the same, except in case defined in subhead (a). Service of a copy of the writ of attachment showing the returns of the attaching officer shall be sufficient notice for the purposes of this Section. Such writ may be executed by the Commissioner, his duly authorized agent, or by any sheriff or constable in the State. Upon the seizure of the article or product described in the affidavit, it shall be the duty of the officer or person executing the writ to return same to the Circuit Court, with his return thereon, and within five days after its return, the Court shall make up an issue between the State as Plaintiff and the property seized as defendant. (a) In the event that the owner or his agent cannot be found in this State, then said service may be perfected by posting a copy of the writ in a conspicuous place upon the premises where the goods were found and seized, and by mailing a copy thereof by registered mail to the owner, or his agent, to his last known address, and this shall be deemed to be sufficient service of the notice required by this Section. If upon the return day of such writ of attachment, the owner of the article or product, his agent or other party having an interest in same thus notified fails to appear and show cause why said goods should not be condemned, judg-

ment of condemnation and confiscation shall, upon such default, be rendered by the Court on the basis of said complaint. If such owner or agent or other party having an interest in such article or product shall on or before the return day of the writ of attachment, or upon such other day as the Court upon application of such party may determine, shall file an answer upon oath denying the allegations of adulteration, misbranding, or under standard, grade, weight or measure, as the case may be, in said complaint, the issue thus raised may be determined by the Court after hearing all the evidence offered by or in behalf of all the parties to the proceedings. Any such party may demand a jury trial of any issue of fact to be determined in the proceedings instituted hereunder, and in case a jury trial is demanded, the judgment rendered by the Court shall be in accordance with the facts as found by such jury; provided, however, that the verdict of the jury may be set aside by the Court where manifestly contrary to the evidence of law. If a judgment of condemnation and confiscation is rendered against such article or product as being adulterated, misbranded, or under standard, grade, weight or measure, within the meaning of this Article, the same shall be disposed of by destruction or sale, as the Court may direct, and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Agricultural Fund, but such goods shall not be sold contrary to the provisions of this Article; provided, however, that upon the payment of the costs of such attachment proceedings and the execution and delivery of a good

and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this article, the Court may be ordered direct that such article or product shall be delivered to the owner thereof.

REMARKS OF SENATOR SPOONER—APRIL 3, 1902—CONGRESSIONAL RECORD, FIFTY - SEVENTH CONGRESS—VOLUME 35, PART 4, PAGE 3604

"I repeat today what I said the other day, that a business that comes before Congress with the statement that its life depends upon being permitted to violate the laws of 32 States with comparative immunity, and to unrestrainedly put upon the market an article which looks and tastes and smells like something which it is not, is not much entitled to consideration.

Does the bill interfere or invade in any way the rights of the States? Of course, a State must not be permitted to say what article subject to Federal taxation can be taxed in a State. Does this invade in any way the sovereignty of a State? Does it do so any more than in the case of the Federal liquor tax? The Congress taxes liquor made in Wisconsin. The State of Wisconsin has the power, the Supreme Court says, to prohibit its manufacture within its boundaries. Of course, in that event there would be no tax to be collected from it. So as to oleomargarine. The States, under this law, may prohibit its manufacture

colored in the similitude of butter; but if they permit its manufacture colored in the similitude of butter they cannot exempt it from the tax imposed by Congress. ***

I want further to say, Mr. President, that *this bill does not in any way shackle a State. It is a concession to the States, as has been generally understood, because up to this time, I believe, it has been generally regarded, that the original package doctrine has been held to be applicable to this product when it is imported into the States, and that the States have no power, therefore, to regulate it or to interfere with it until the original package is broken. I am not at all certain that that is good law, but it has been so regarded. But under the provisions of this bill that cannot be again contended, because, whether necessarily or unnecessarily, this bill applies to oleomargarine the provisions similar to the Wilson law.*

FORM USED IN SEIZURE IN THIS CASE

AFFIDAVIT FOR WRIT OF ATTACHMENT FOR CONDEMNATION:

(as provided in Section 218, of the Agricultural Code of Alabama of 1927)

STATE OF ALABAMA

COUNTY OF JEFFERSON

Before me Richard V. Evans, (CIRCUIT JUDGE) of the County of Jefferson, in Alabama,

personally appeared E. F. Cottier, who being duly sworn, deposes and says, (1) that he is a duly authorized agent of the Commissioner of Agriculture and Industries of this State, (2) that there is located on the premises of Birmingham Ice and Cold Storage Co., Birmingham, Ala., certain packing butter described as follows, to wit:

10-55 gallon steel drums containing 3,991 pounds of packing stock butter represented by sample Nos. 61 C-K thru 70 C-K incl.

(To credit of Cloverleaf Butter Co., Birmingham, Ala.)

which, affiant, E. F. Cottier has probable cause to believe, and does believe, is manufactured for sale, or held in possession with intent to sell, or offered, or exposed for sale, or sold, or delivered within this State, and on the 21 day of June, 1939 was held in possession by a person within the State of Alabama who manufactures, sells, keeps for sale, offers or exposes for sale, serves, distributes or delivers the same; and which, affiant, E. F. Cottier, has probable cause to believe, and does believe, is adulterated within the meaning of the provisions of the Agricultural Code of 1927, and amendments thereto, in the following particular to wit:

said butter is adulterated in that it consists in whole or in part of a filthy animal substance.

namely, butter which contains maggots, flies, fly fragments, rodent hairs and other extraneous matter

contrary to law and against the peace and dignity of the State of Alabama; and (3) that such butter should be seized and forfeited to the State.

E. F. Cottier
Name of Party making Affidavit

Sworn to and subscribed before me this the 21 day of August 1940

Richard V. Evans, Circuit Judge
Name and Style of Officer taking Affidavit

REGULATIONS NO. 9

RELATING TO

TAXES ON OLEOMARGARINE, ADULTERATED BUTTER, AND PROCESS OR RENOVATED BUTTER

Chapter I

PLAN OF REGULATIONS

These regulations deal with a number of statutes imposing taxes on three different commodities—oleomargarine, adulterated butter, and process or

renovated butter; also special taxes on persons manufacturing or selling such commodities.

So far as practicable the subject matter is divided first according to the commodities, and second according to the special-tax payers involved, the general plan being to bring the matter involving a given commodity or taxpayer under one head.

To avoid repetition much matter applicable to all three commodities has been incorporated as pertaining to oleomargarine, or one or more of the special taxes relating to oleomargarine. Its application to the other commodities or special taxes is shown by cross reference.

If any situation involving a particular tax is dealt with in connection with that tax, it should not be concluded that the regulations throw no light on the subject. If no cross reference is found, the index should be consulted and inquiry directed to other taxes which might involve the same situation.

Provisions of the statutes upon which the various articles of the regulations are based generally have not been repeated in the articles. Therefore the statutory excerpts preceding the several articles should be examined to obtain complete information.

Chapter XII

PROCESS OR RENOVATED BUTTER

Definition

Art. 120. *Definition applied.*—(1) The terms "process butter" and "renovated butter" are used synonymously in these regulations and it is immaterial, for the purposes of the Acts cited herein, whether a manufacturer designates the product "process butter" or "renovated butter".

(2) Butter which falls within the definition of adulterated butter (see article 101) is subject to tax as adulterated butter rather than as process or renovated butter. The principal difference between adulterated butter and process or renovated butter is with respect to the use of chemicals or other substances. Butter reworked with the use of chemicals or other substances is adulterated. Butter which is melted, clarified, or refined without the use of chemicals or other substances is process or renovated butter.

(3) Ladled butter is taxable as process or renovat butter if, in addition to being reworked, it is melted, clarified, or refined. By the term "ladled butter" is meant butter reworked by mixing or stirring, usually for the purpose of obtaining uniformity of color, and not melted, and softened no more than necessary to facilitate mixing or stirring. Pro-

vided the butter is not melted, cleansing of ladled butter by washing with water or otherwise than by use of chemicals or other substances will not give the butter the status of process or renovated butter or adulterated butter. "Melted" as herein used means such melting as is distinguishable by the Waterhouse test.

For definitions of "butter" and "adulterated butter" see section 1, Act of August 2, 1886, and section 4, Act of May 9, 1902, respectively.

Art. 121. *Commodity tax.*—The tax on process or renovated butter accrues upon manufacturer or sale or removal from the place of manufacture. The tax shall be paid by the manufacturer by affixing stamps to the packages before they are removed from the bonded premises. If, however, the Commissioner deems it necessary, he may require the attachment of stamps, or may assess a tax, at any time after manufacture. A fraction of a pound is taxable as a pound.

The law makes no provision for exporting process or renovated butter free of tax.

Art. 122. *Manufacturers' special-tax liability.*—A manufacturer shall make return on Form 11 to the collector, pay special tax, and comply with the provisions contained in Chapter VII, relating to special taxes. As to execution of returns, see article 93.

Art. 123. *Administrative requirements.* — (*a*) *Provisions applicable.* — The provisions of these regulations as to oleomargarine manufacturers' notices (article 22), inventories (article 23), records (article 24), returns (article 25), factories (article 26), bonds (article 27), sales by legal process (article 99), and all other provisions of these regulations relating to oleomargarine, so far as applicable, are hereby extended and made to apply to process or renovated butter.

(*b*) *Penal sum of bond.*—The penal sum of the bond required of a manufacturer of process or renovated butter shall be not less than $500.

Art. 124. *Packages.*—(*a*) *Bulk containers.*—Manufacturers shall pack process or renovated butter in firkins, tubs, or other wooden, fiber, or paper containers. Except when packed for export (see article 131), packages shall not be incased in jute, burlap, or other heavy wrapping.

(*b*) *Empty containers.*—When any tax-paid packages of process or renovated butter are emptied, the stamps must be destroyed as provided in section 13, Act of August 2, 1886, relating to oleomargarine.

(*c*) *Prints and rolls.*—Manufacturers may pack process or renovated butter in prints or rolls and place them in paper cartons or wrappers, or con-

tainers of tin or similar material, sealed hermetically or otherwise, provided the coverings are branded as provided in article 128(*b*).

Art. 125. *Caution notice.*—Before removal from the factory each statutory package of process or renovated butter must have legibly and conspicuously printed or labeled on it the following notice, which must measure not less than 3 inches long by 1½ inches wide:

FACTORY NO. ..... DISTRICT, STATE OF .....

NOTICE.—The manufacturer of the renovated butter herein contained has complied with all the requirements of the law and regulations authorized thereby. Every person is cautioned not to use again either this package for renovated butter or tax stamp thereon or to remove the contents of this package without destroying said stamp, under penalty provided by law in such cases.

Art. 126. *Stamping packages.*—Stamps for the payment of the tax on process or renovated butter are designated "Process Butter" and are issued in sheets of 20 stamps each, in denominations of 10, 20, 30, 40, 50, 60, and 100 pounds. One-pound coupon stamps for use in connection with stamps of the foregoing denominations are issued in sheets of 200 stamps each.

The provisions of article 31 as to ordering, affixing, and canceling stamps, and article 32 as to repacking and restamping oleomargarine, so far as applicable, are hereby extended and made to apply to process or renovated butter.

Art. 127. *Wholesale dealers.*—(*a*) *Definition.*—Every person selling process or renovated butter in quantities of 10 pounds or more at one time (not including manufacturers selling only at the registered place of business) is a wholesale dealer in process or renovated butter.

(*b*) *Dealers exempt from liability.*—A person who sells process or renovated butter is not subject to special tax unless he is a manufacturer of the product.

(*c*) *Records and returns.*—Wholesale dealers in process or renovated butter shall keep records and render returns corresponding to those required of wholesale dealers in oleomargarine by articles 42 and 43, respectively.

(*d*) *Other administrative provisions.*—All articles of these regulations relating to wholesale dealers are hereby made to apply, so far as applicable, to wholesale dealers in process or renovated butter.

Art. 128. *Branding.*—(*a*) *Statutory packages.*—Before removal from the factory each package of process or renovated butter shall have legibly printed or stenciled on one of its sides the legend "Process Butter" or "Renovated Butter"; also the factory number, district, and State, and the net weight, in following manner:

PROCESS BUTTER
Factory No. 2, 2d Dist., New York
Net Weight, 60 lbs.

The legend "Process Butter" or "Renovated Butter" shall be in bold-face gothic letters not less than three-quarters of an inch square and the other words and figures not less than half an inch square. The color of the legend shall be in strong contrast to that of the package.

(*b*) *Cartons and wrappers.*—(1) The wrappers, cartons, or other containers in which prints or rolls are placed shalls be branded with the legend "process Butter" or "Renovated Butter", in bold-face gothic letters, not less than three-eighths of an inch square. Such legend shall form a strong contrast to the color of the wrapper or container. No other marks shall be made on the side of the wrapper or container on which the legend is placed.

(2) Each package must show the manufacturer's name and address or the factory number, district, and State, and bear a plain and conspicuous statement of the net weight of contents. Such wrappers, cartons, or other containers shall bear no pictorial or other representation which may create the impression that the article is butter as defined by the Act of Congress of March 4, 1923. (See article 100 (2).)

(*c*) *Surface impression.*—The top surface of solid-packed goods shall be imprinted with the legend "Process Butter" or "Renovated Butter", in plain gothic letters not less than half an inch square, and

impressed at least an eighth of an inch deep. Prints and rolls shall be similarly impressed with letters not less than three-eighths of an inch square. The surface impression may be omitted from prints and rolls of less than a pound unit weight, provided there is compliance with all other requirements.

(*d*) *Brands requiring approval.*—With the exception of shipping marks, any marks, brands, or labels, other than those prescribed by these regulations, shall be approved by the Secretary of Agriculture before they are used on packages of process or renovated butter.

(*e*) *Evidence of approval.*—Approved copies of all marks, brands, or labels shall be retained at the manufacturer's registered place of business, available for inspection by representatives of the Department of Agriculture.

(*f*) *Penalty for omitting or removing brand.*—Every manufacturer of process or renovated butter who fails to brand the product and the containers in which it is packed, is punishable by a fine of not less than $50 nor more than $500 or by imprisonment for not less than one month nor more than six months, or both. Every person who removes any such brands from any package of process or renovated butter is punishable by a fine not exceeding $1,000 or imprisonment not exceeding one year, or both, as provided in section 4, Act of March 3, 1891, made applicable by section 5, Act of May 9, 1902.

Art. 129. *Misbranding under Food and Drugs Act.*—Misbranding any article of food intended for interstate commerce, or manufactured or offered for sale in any Territory of the United States or the District of Columbia, is prohibited. That for the purposes of this Act an article shall also be deemed to be misbranded:

In the case of food—

(1) If it be an imitation of, or offered for sale under the distinctive name, of another article.

(2) If it be labeled or branded so as to deceive or mislead the purchaser, or purports to be a foreign product when not so, or if the contents of the package, as originally put up, shall have been removed in whole or in part and other contents shall have been placed in such package.

(3) If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, or numerical count.

(4) If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular.

No provision of these regulations shall be construed so as to relieve any person from compliance with the Federal Food and Drugs Act.

Art. 130. *Factory inspection.*—(*a*) *Authority to inspect.*—Inspectors of the Department of Agriculture, are authorized to enter all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market, for the purpose of examination or inspection authorized by this Act.

(*b*) *Report of condition.*—Periodic inspection of each factory shall be made by such inspectors who will submit a complete report to the Secretary of Agriculture on the sanitation of the premises, the character and condition of the materials used, and the quantity and quality of process or renovated butter produced. The sanitary provisions of the meat inspection Act shall apply to the sanitary inspection of process or renovated butter factories. (See Act of August 10, 1912 (37 Stat., 273).)

(*c*) *Impure ingredients.*—Process or renovated butter containing any filthy, decomposed, or putrid animal or vegetable substance shall be deemed adulterated under the Food and Drugs Act.

(*d*) *Deleterious products seizable.*—The Secretary of Agriculture will determine whether or not materials being used in the manufacture of process

or renovated butter will be deleterious to health or unwholesome in the finished product. If any materials which have been so determined to be deleterious to health or unwholesome in the finished product are found to be present in any process or renovated butter, intended for, or in course of, exportation or shipment in interstate commerce, such process or renovated butter will be confiscated.

Art. 131. *Exportation requirements.*—(*a*) *Stamping, branding, covering.*—Original packages of process or renovated butter for export shall be stamped and branded as in the case of packages for domestic use (see articles 126 and 128) and may be covered with cloth, jute, or burlap. The outer covering shall be conspicuously stenciled with the legend "Process Butter" or "Renovated Butter", in bold-face gothic letters not less than an inch square, and the words "For Export only" on the line beneath, in similar letters not less than three-eighths of an inch square.

(*b*) *Inspection.*—Process or renovated butter for export shall be examined by inspectors of the Department of Agriculture, who will issue a certificate as to its purity, quality, and grade and the sufficiency of the stamps and brands. If inspection is not made before the outer coverings are placed upon the packages, the exporter may be required to remove them.

Art. 132. *Reports of violations.*—(*a*) *By agricultural inspectors.*—Inspectors of the Department of Agriculture who find on the market process or ren-

ovated butter, or butter suspected of being processed, renovated, or adulterated, without the required tax stamps and caution notice, will report the matter to the nearest internal-revenue officer. If in doubt as to the character of the product, the inspector should forward samples to the Laboratory Division, Treasury Department, Washington, D. C., for analysis, as provided in article 13(*a*).

(*b*) *By revenue officers.*—Internal-revenue officers who discover on the market process or renovated butter which does not comply with these regulations will promptly notify the Chief of the Bureau of Dairy Industry, Department of Agriculture, Washington, D. C., as to their findings.

Art. 133. *Authority for regulations.*—The foregoing regulations relating to process or renovated butter are dual in their scope. The provisions pertaining to internal-revenue matters are under the jurisdiction of the Secretary of the Treasury and those relating to inspection are under the control of the Secretary of Agriculture. The regulations pertaining to internal-revenue matters are made under the authority of section 321, R. S., cited above.

Art. 134. *Administrative jurisdiction.*—The administration of articles 120 to 127 of these regulations, as to process or renovated butter, is under the Commissioner of Internal Revenue, Treasury Department, and the administration of articles 128 to 131 is under the Chief of the Bureau of Animal In-

dustry, Department of Agriculture, Washington, D. C. Correspondence pertaining to the subject matter of the respective articles should be addressed to the bureau having jurisdiction in the matter.

Art. 135. *Promulgation of regulations.*—In accordance with the authority granted by the law, the foregoing regulations relating to process or renovated butter are hereby promulgated.

GUY T. HELVERING,
Commissioner of Internal Revenue.

Approved as to Treasury Department.

WAYNE C. TAYLOR,
Acting Secretary of the Treasury.

Approved as to Department of Agriculture.

H. A. WALLACE,
Secretary of Agriculture.